In the Supreme Court of the United States.

GEORGE DEWEY, APPELLANT,
v.
THE UNITED STATES.
No. 546.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The sole question raised by this appeal is upon the construction of a few words of the statute upon which is based the distinguished claimant's right to bounty for the destruction of the vessels of the enemy at the battle of Manila Bay on May 1, 1898. The pertinent part of that statute is:

> A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement, by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force and of two hundred

dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money. (Section 4635, R. S.)

The claimant contends that the various forts and land batteries, together with the torpedoes and submarine mines in the bay and at the entrance, which supported the enemy's vessels during the engagement, should be taken into consideration in determining the force of those vessels. But the Court of Claims held that the force contemplated by the statute was "such force only as is necessarily incident to the men employed upon the vessel, and to the force of the vessel arising from its construction, its armament, equipment, and development as an instrument of war." And that the terms of the statute preclude from the consideration of the force of the enemy's vessel "the environment of power which may surround it but form no necessary part nor portion of it."

As the court found that the force of the enemy's vessels, thus considered, was inferior to that of the American vessels, but that the force of the enemy reckoned according to the claimant's contention was superior to ours, the bounty awarded by the court pursuant to its construction of the statute was but half the amount claimed—and hence this appeal.

It is clear that the natural and ordinary meaning of the words "if the enemy's vessel was of inferior, * * * if of equal or superior force" is naval or maritime force. Certainly there is no suggestion to the mind of *land* force of any sort from the use of the

term force of a *vessel*. Appellant's counsel argue that it is equally remote to extend the word "vessel" to include "vessels," but there is no foundation for this attempt at *reductio ad absurdum*. To say nothing of the familiar rule that in the construction of statutes words expressed in the singular may be extended so as to include the plural, it is too manifest to admit of serious discussion that the statute is intended to apply to engagements between several vessels as well as to naval duels. Nor is there any strained conclusion in construing the force of an unarmed prize to include the force of her convoy. The prize and the convoy combined constitute one naval force of which each vessel is a part. Hence the force of each is the force of every other vessel of the fleet.

But the attempt on behalf of the appellant to read into the phrase "force of a vessel" forts and land batteries and submarine harbor defenses, which for the time being join with it in its engagement with another vessel, can only be accomplished by a forced and most liberal construction of the term. Yet the rule applied to prize statutes (and, of course, to the kindred statutes relating to bounty) is that of the strictest construction.

> Prize was wholly the creature of the Crown. No one could have any interest but what he took as the gift of the King. Beyond this he could claim nothing. The reasons upon which the rule was founded were that right of making war and peace was exclusively in the sovereign; that the acquisitions of war must, therefore, belong to him, and that their disposal might be of the utmost importance for the purposes both of war and peace. It was held that

it must be presumed from these considerations that the Government did not intend to divest itself of this important attribute, except in so far as such a purpose was clearly and unequivocally expressed. The right is not the private property of the sovereign, but a trust confided to him for the public good. In private grants the construction is most strongly against the grantor. In all concessions touching capture the opposite rule prevails. A presumption arises against the grant, and it can only be rebutted by language so explicit as to leave no room for doubt upon the subject. * * * The United States have succeeded to the rights of the Crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority inure *ipso facto* to their benefit. Whenever a claim is set up its sanction by an act of Congress must be shown. If no such act can be produced, the alleged right does not exist. (*The Siren*, 13 Wall., 392–3.)

All prizes made by our ships of war belong primarily to the United States, and any person who claims to participate therein must show a grant from the Government. (*The Cherokee*, 5 Fed. Cas., 551.)

The case of *The Siren*, *supra*, may, indeed, be looked to as fairly decisive of the present case.

The Siren was captured by combined naval and land forces of the United States, and was claimed as prize. The decision of the prize court denying the claim was affirmed by this court, on the ground that no provision is found in any of the statutes of the United States on the subject of prize, touching joint captures by the Army and Navy. (The statute of 1864, under which the claim

was made, is identical with the present statute, sec. 4630—R. S.) And the court cites, as the rule governing the case, Lord Stowell's definition of the word "prize:" "It evidently means maritime captures effected by maritime force only—ships and cargoes taken by ships."

Thus, by strict construction of the statute, this court holds that naval forces which are aided by land forces must be wholly excluded from consideration upon a claim for the fruits of a victory over naval forces. And yet the claimant would have the same court hold that the force so denied consideration when *victorious* shall, when *vanquished*, be wholly taken into account in determining the same question of prize bounty; and this, too, by the exercise of the widest liberality of construction of practically the same statute! And the only argument advanced in support of this contention is that the intent of the prize and bounty laws is "to encourage personal gallantry, enterprize, and perseverence." But here again we may look to the decisions of this court for answer. In *Porter* v. *United States* (106 U. S., 611) the claimant's demand for prize was denied, on the authority of *The Siren*, in the following words:

> Prize money, or bounty in lieu of it, is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the Navy with the cooperation of the Army. To win either, the Navy must achieve its success without the direct aid of the Army, by maritime force only. No pecuniary reward is conferred for anything taken or destroyed by the Navy when it acts in conjunction with the Army in the capture of a fortified position of the enemy, *though the meritorious services and gallant*

conduct of its officers and men may justly entitle them to honorable mention in the history of the country.

The illustrations which counsel for appellant give to show the alleged absurd consequences of the construction given to this statute by the Court of Claims establish no such conclusion, but simply that the statute does not provide for every contingency, and that hence inequality and hardship must result in certain instances. But none of these illustrations equal in hardship the cases governed by the rule of construction announced in *The Siren*. Under that rule, if a naval force should engage and capture or destroy a fleet of the enemy of twice its strength, it could be awarded neither prize nor bounty if it were assisted during that engagement by but one gun of a land force. And what fairness is there in giving to the victors in an equal naval combat the same reward as though the victorious force were but half that of the enemy, or why should the reward where the victorious fleet is represented by 101 and the enemy's fleet by 100, be but half what it would be if each were 100?

Whether or not Congress should or could have enacted a law which would give due effect to every thing and circumstance which went to make up effectiveness, or to affect the strength of the forces engaged, it is certain that Congress did not undertake to do anything of the kind. It undertook to provide for certain specific conditions, without any regard to the existence of other conditions, although the latter might have a very important bearing on the results of a naval engagement. Doubtless Congress realized that an ideal bounty law, operating

with absolute justice and harmony in all cases, was impossible, and hence it established fairly reasonable limits to the operation of the statute, without regard to whether these limits might not unreasonably have been somewhat different.

EFFECTIVENESS OF SHORE DEFENSES, TORPEDOES AND SUBMARINE MINES.

I have no desire to question nor discuss the authorities cited by appellant's counsel to the effect that in encounters between naval forces and land batteries the advantage is immensely in favor of the latter, and that torpedoes and submarine mines are most formidable and deadly. By the facts thus established the appellant's counsel proves too much. For they do not have the boldness to contend that prize or bounty can be awarded for the capture or destruction of land batteries, and yet, according to their own showing, it is therein that a naval force would evince the highest degree of skill and gallantry. And this leads to the suggestion that counsel have scarcely the courage of their convictions on this score. What good reason is there, after reading the forts and land batteries into the "force of the enemy's vessels," for leaving them out when it comes to the distribution of prize or bounty? Once having got them into the engagement as a part of the naval force of the enemy, why should they not remain to be distributed as prize, or to increase the amount of the bounty?

AUTHORITIES ON LIBERAL CONSTRUCTION.

In view of what seems to be the undoubted rule governing this case, that the statute under consideration must be strictly construed, the decisions cited to fortify the contention made by appellant's counsel for a liberal construction of the statute seem to be irrelevant and I shall not discuss them.

PRECEDENTS AND ACQUIESCENCE.

Appellant's counsel contend that the decision of the court below substitutes a new rule of construction for an old one, because, they say, double bounty was allowed in the Farragut case. The court below has pointed out that the double bounty was allowed in that case because the arbitrators found, *as a fact*, that the enemy's force was superior. Apparently this finding was due to the arbitrators, taking that view of the law for which the appellant now contends; but the district court had held the parties bound by the action of the arbitrators, and the appeal as ultimately heard did not touch that action in regard to this particular matter. So far from there being any rule, then, requiring the word "force" in section 4635 to be construed as including land batteries, there was merely the action of a board of arbitrators, in a single instance, unsupported by judicial authority. Such action can not possibly have any weight comparable to that of a rule of law. Nor does there seem to have been that degree of acquiescence in a positive and well-defined interpretation of the statute as should operate to estop the defense here made.

There can be no doubt that, taken by themselves, the words, "if the enemy's vessel was of inferior force, * * * if of equal or superior force," do not relate to other than naval force, and also that there is nothing in section 4635 itself to suggest that any other than a naval force was in contemplation. Is there, under these circumstances, any evidence that Congress intended to include land forces cooperating with a naval force?

When the first prize and bounty laws were passed an engagement between fleets in a harbor where one fleet was supported by land batteries was an extremely rare occurrence. Owing to the comparatively short range of the guns of that day, a vessel could approach much nearer the shore without being exposed to the fire of land batteries than could now be done. To be exposed to such fire, moreover, was peculiarly dangerous, as the proximity of the shore necessarily hampered very much the freedom of movement of sailing vessels. To such causes as these may be traced the fact that at that time naval engagements occurred, as a rule, at some distance from shore, and scarcely ever within the range of land batteries. Under these circumstances it is very probable that when the act of April 23, 1800 (2 Stats., 45), was passed the very remote contingency of a naval engagement within the range of land batteries was not thought of at all. Had it been thought of and had Congress intended that the enemy's land force should be considered in estimating bounty in such a case, it is practically certain that appropriate words would have been used to definitely express

such an intention. And these words would readily suggest themselves. It was only necessary to substitute "enemy's force engaged" for the words actually employed. They were not used, however, and as it does not appear that such an intention existed, no such words can now be read into the statute.

The words of the act of 1800 are "any ship of an enemy * * * which shall be sunk or destroyed by any ship or vessel of the United States of equal or inferior force." It is perfectly certain that the "force" of the "ship or vessel of the United States" means naval force only (*The Siren*, 13 Wall., 395); and this being so, it is equally certain that that statute did not take into consideration any other kind of "force" in regard to a "ship of an enemy." From the time of the first American statute on this subject, therefore, the word "force" must have had the meaning of "naval force" exclusively.

Subsequently other statutes were passed, including the one now in consideration, which practically dates from 1862. The conditions of naval warfare had changed somewhat, though less change had occurred as regards offensive and defensive armament between 1800 and the enactment of the Revised Statutes than since those statutes were adopted. Except in regard to the amount of the bounty, the language of section 4635 does not materially differ from that of section 7 of the act of April 23, 1800, and certainly there is nothing whatever to show any intention that the word "force," which, as has been seen, must, in the act of 1800, have referred to naval force alone, was to receive a new meaning, viz, any force,

of any character whatever, belonging to or cooperating with the enemy's vessel. The word "force," having originally been so used as to refer to naval force exclusively, had practically acquired a technical meaning, and it would have needed some special and very definite language to show an intention to use it in any new or extended meaning. No such language can be found, and the conclusion must be that Congress, whether through inadvertence or of set purpose, had no intention to take into account any land forces cooperating with the force of the enemy's vessel.

Appellant's counsel contend that the great increase in the rate of bounty, made by the act of 1862 over the rates fixed by the earlier acts, must have been due to the fact that the use of torpedoes had increased the risks of naval warfare, and hence that the word "force" must have been intended to include all land forces which aided the enemy's vessels. It is probable that the increase in the size and effectiveness of the guns used in 1862 over those used in 1800, and the use of steam, which made it easier for an enemy's vessel to escape, and thus rendered her destruction more difficult, had more to do with the increase in the bounty than had the mere fact that torpedoes had come to be used, as the rate of bounty is the same whether torpedoes are used or not. Conceding, however, that Congress had torpedoes especially in mind, the conclusion of appellant's counsel does not follow. The torpedo is primarily an engine of naval warfare. It is carried on vessels of war, and may be discharged directly from them by tubes specially made for this purpose. Certain types

of vessels are known as torpedo boats, or torpedo-boat destroyers, and are armed mainly with torpedoes. Torpedoes used by vessels are as much a part of their force as are the guns which they use, and should be taken into account in estimating comparative force. Stationary torpedoes or mines, planted by a naval force and exploded either by concussion or by electric wires extending and operated from vessels, might also be properly taken into account. On the other hand, mines used as land defenses, planted by a land force, and operated from the shore by electric connection, are as properly a part of the land force as are the guns in the batteries. The mere existence of torpedoes, like the existence of improved cannon, is no reason for giving the word "force" in section 4635 any other than a naval signification. If used by vessels as a means of naval warfare, they constitute a part of the naval force, while if used by land forces they constitute a part of the land force, precisely as in the case of all other engines of war. Hence the fact that torpedoes, or even mines, should, under section 4635, be taken into account when used by a naval force is no reason for taking them into account when used by a land force, nor is it any reason for taking land batteries into account.

THE INTENT OF THE STATUTE.

Counsel for appellant very naturally dwell upon the heroic features of the battle of Manila Bay; and here it may be said that if the measure of the bounty claimed in this action were simply the degree of skill and daring and heroic achievement displayed by the claimant and the

forces under his command in that memorable engagement, there would be an end of controversy.

But it will not do to let the glamour of that splendid story blind our eyes to the purely legal proposition which is here presented. Whilst it is undoubtedly true that the naval prize and bounty laws are intended to encourage "personal gallantry, enterprise, and perseverance," nevertheless these elements do not and can not enter into the determination of the amount of prize or bounty to be awarded, pursuant to statute, to the victors in a naval combat. The relative strength of the opposing forces alone determines the question. And so proof of the highest qualities of skill and heroism can of itself avail nothing on such a claim as this. *The terms of the statute* must be complied with else the claim must fail. Against the argument that the spirit of the law has been fulfilled on proof of great skill and gallantry is the fact that Congress has refrained from providing a reward for various instances of the display of these qualities.

As has been shown, there is no provision for the capture or destruction of the enemy's vessels by combined forces of the Army and Navy. Nothing can be claimed for the capture or destruction of land batteries or forces by a naval force, and there is absolutely no reward in the nature of prize or bounty provided by law for the most heroic victories in military battles.

The Court of Claims seem to have adopted the only safe rule of guidance in determining this claim, and it is difficult to perceive how a different conclusion could have been reached by them save by yielding to the

spirit of grateful generosity which is bound to exert its influence in the consideration of this claim, whether we will or no.

LOUIS A. PRADT,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE DEWEY, APPELLANT,
v.
THE UNITED STATES. } No. 546.

APPEAL FROM THE COURT OF CLAIMS.

ADDITIONAL BRIEF FOR THE UNITED STATES.

The contention made by counsel for the appellant in their reply brief, that the case of *The Siren* (13 Wall., 389), relied upon herein in the brief for the United States, is not applicable to the facts in this case, and that, at all events, the rule therein laid down is *obiter dictum*, seems to warrant further reference to that case.

The Siren was captured by the United States vessel of war *Gladiolus*. She received no direct nor immediate aid from the land forces of the United States in making this capture, but the presence and proximity of those forces did practically contribute to the capture. The question presented upon this state of facts was, whether

The Siren could be considered prize, and the determination of this question rested upon the construction of the statute upon which the claim of prize was based. That statute awarded prize to the vessel or vessels making the capture, and it is clear that if this court had adopted the rule of liberal construction which is here invoked, it might very reasonably have allowed the claim, for the *Gladiolus* certainly captured *The Siren;* and although this capture was effected with the aid of the land forces, there were no express words of the statute denying an award of prize under such circumstances. Yet this court adopted and applied to the case the rule of strict construction of prize statutes laid down by eminent English authority. It is difficult to understand how this assertion of that rule was, as claimed by counsel for appellant, "pure *obiter dictum*." Surely it was necessary to construe the statute, and in so doing, it was equally necessary to announce the rule for such construction; hence the rule became, it would seem, an essential part of the decision. A similar rule of action was announced in the very carefully considered case of the *Cherokee* (5th Fed. Cases), on page 551, 552.

> It must be borne in mind that we are not discussing a question of general jurisprudence, or endeavoring to ascertain a rule of the unwritten law to be determined by judicial precedents or considerations of justice and policy, but we are endeavoring to ascertain the true meaning and intent of a positive legislative enactment.

We find, too, in this same case, a very appropriate characterization of the rule of construction asked for by

appellant in this case. On page 555 the court, in discussing the English decisions in favor of constructive joint capture, criticises the same as follows:

> We look in vain, not only for the terms of any act of Parliament, but for any remark which indicates that any such act existed. The claims of captors are discussed, not as resting upon express grant, but as if they were questions of common law, depending merely upon previous decisions and general considerations of justice and policy.

And further:

> Thus it appears that a constructive captor comes in by the indulgence of the court and not by the natural construction of the statute grant. In reading many of the decisions it is evident that the courts, following their own views of policy or expediency, have indulged in a latitude of construction, which has carried them out of sight of the test which they were supposed to be expounding. That the decisions had gone beyond the just interpretation of the terms of the grant is not unfrequently admitted by the courts themselves.

But counsel insist that in *The Siren* the inquiry was, whether there was a grant of prize, while in this case the grant is conceded and the sole question is of the amount of the bounty thus granted. But practically this distinction does not exist, for here it is the grant of the lesser bounty only that is conceded, and the real question is, whether there is a grant of double bounty. This question must be determined, as in *The Siren*, by construing the statute upon which it is claimed the grant is based; and, viewing it thus, it certainly seems reasonable to

argue that the same rule of strict construction should be applied here as was applied in the case of *The Siren*.

It may properly be added that I am not urging this court, as an original proposition, to apply the rule of strict construction to prize and bounty statutes. I am simply pointing to the fact, as I understand it, that the court has already declared that such is the rule of interpretation of these statutes.

CAPTURES ON LAND BY NAVAL FORCES.

Appellant's counsel make the assertion, for which I know no warrant, that the English *law of prize* extended to captures on land by naval forces. The case of *Mrs. Alexander's Cotton* (2 Wall., 421,) holds directly to the contrary. Nor is that case authority for the further statement of counsel for appellant, that "this was repealed in this country by the act of July 17, 1862 (12 Stat. L., 606)," for there never was any such law in this country to be repealed.

FORCE OF PRIZE.

The statement heretofore made in the brief for the United States in this case regarding the force of an unarmed prize is construed as a concession of the "logic of their position" by claimant's counsel; but this scarcely follows. To state that the vessels of a fleet which includes an unarmed prize constitute one naval force pertaining to the prize as well as to every other vessel of the fleet, is hardly an admission that a *land fort* may also be considered as a part of the same force. There is abundant

authority for treating a fleet as one naval force. This doctrine of association of vessels has been summed up by Lord Stowell in the phrase that, in such cases privity of purpose creates community of interest. (*The Selma*, 21 Fed. Ca., 1046.)

In the case of *The Atlanta* (3 Wall., 425,) the monitor *Nahant* was included with the *Weehawken* as part of the naval force of the United States, although the *Weehawken* engaged the *Atlanta* and compelled her to surrender before the *Nahant* could get into action or had fired a gun.

INTENT OF THE STATUTE.

I desire to add to what I have already said on the above subject that, although the intent of our prize and bounty laws may be to *encourage* personal gallantry, yet prize and bounty are not necessarily bestowed as a reward for the exercise of those qualities. The case of the *Atlanta*, above cited, is a striking exemplification of this fact. The crew of the *Nahant* were held entitled to share in the award of prize in that case, although the engagement was over before they had had an opportunity to display in the slightest the gallantry which they undoubtedly possessed.

And see *La Clarinde* (1 Dods., 436).

LOUIS A. PRADT,
Assistant Attorney-General.

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